United Nations **AT**

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 983

Case No. 1072: IDRISS

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas at the request of Husni Ahmed Idriss, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended until 31 May 1999 the time-limit for the filing of an application with the Tribunal;

Whereas, on 15 February 1999, the Applicant filed an application containing pleas which read as follows:

"**SECTION II. PLEAS**

Applicant prays the esteemed Tribunal to ...:

a. [Rescind the] contested decision and [reinstate the] Applicant to duty.

b. [Consider the] period of cessation as special leave with full pay.

c. [Compensate] the Applicant for the damage and injury sustained.

d. [Pay] counseling and secretarial and transport expenses estimated at US$ 800."

Whereas the Respondent filed his answer on 30 November 1999;

Whereas, on 6 July 2000, the Applicant filed an additional document;

Whereas, on 7 July 2000, the Tribunal put questions to the Respondent;

Whereas, on 20 July 2000, the Respondent produced certain confidential documents requested by the Tribunal and asked that they not be transmitted to the Applicant in order to protect the identity of the witnesses;

Whereas, on 7 August 2000, the Tribunal put questions to the Applicant and to the Respondent;

Whereas, on 8 August 2000, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 7 September 2000, the Respondent provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas, on 15 October 2000, the Respondent provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 January 1985, as an Area staff member, with the title of Welfare Worker, grade 7, Tyre Office, South Lebanon, on a temporary indefinite appointment. On 1 July 1993, his post was reclassified to Social Worker, grade 9. Since his qualifications and experience did not fully meet the requirements of the reclassified post, he was promoted to grade 8. The Applicant was separated from service, effective 13 May 1997.

On 5 February 1996, the Director, UNWRA Affairs, convened a Board of Inquiry (BOI) on 24 October 1995, to investigate alleged irregularities in connection with the distribution of commodities at Jal El Bahr, Tyre Area.

On 11 November 1996, the BOI submitted a report to the Director, UNRWA Affairs. The report included a number of allegations made against the Applicant. The BOI found, among other things that the Applicant had misappropriated Agency funds and intentionally deviated from its

Regulations and Rules. The BOI reconvened, at the request of the Director, UNRWA Affairs, on 17 and 18 March 1997, to "confront accused staff members with the accusations" and to give them an opportunity to respond to the allegations. It submitted a supplementary report on 15 April 1997. In the Applicant's case, nothing new came to light and the conclusions of the original report stood.

In a memorandum dated 7 May 1997, the Director, UNRWA Affairs, informed the Applicant that based on the findings of the BOI, he had decided to terminate the services of the Applicant for misconduct pursuant to Area staff regulation 10.2, effective close of business, 13 May 1997. He enclosed extracts of the BOI reports.

On 6 June 1997, the Applicant requested the Director, UNWRA Affairs, to review his decision. On 12 June 1997, the Director, UNRWA Affairs, informed the Applicant that his decision would not be changed.

On 11 July 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 30 June 1998. Its evaluation, judgement and recommendation read, in part, as follows:

> "**III. EVALUATION AND JUDGEMENT**
>
> 14. ...
>
> (a) The Board noted that the termination of the Appellant's appointment was properly made in accordance with Area Staff [Regulations and Rules].
>
> (b) In this context, the Board believes that the Administration has acted within the framework of standing [Regulations and Rules] without the interference of prejudice or any other extraneous factors.
>
> **IV. RECOMMENDATION**
>
> 15. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed."

On 6 August 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

I have carefully reviewed the Board's report and noted its conclusions. The Board noted that the termination of your appointment was properly made in accordance with the Area Staff [Regulations and Rules], and opined that this action was taken without the interference of prejudice or any other extraneous factors. Accordingly, the Board unanimously recommended to uphold the decision to terminate your appointment.

I accept the Board's recommendation. Your appeal is dismissed."

On 15 February 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The BOI investigation was incomplete and prejudicial and violated the due process rights of the Applicant. The Applicant was not permitted the opportunity to confront and examine a number of key witnesses.

2 The JAB was provided only with extracts of the BOI reports and therefore did not give the case a proper hearing and exercise its duties and obligations in that regard.

3. The Respondent's decision to terminate the Applicant's services for misconduct was not based on proper evidence.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's services for misconduct fell within the discretionary powers of the Commissioner-General.

2. The Respondent's decision to terminate the Applicant's services for misconduct was correct, not motivated by any improper motive and supported by evidence.

The Tribunal, having deliberated from 7 July to 2 August 2000 in Geneva and from 31 October to 21 November 2000 in New York, now pronounces the following judgement:

I. Following reports of irregularities involving certain staff members during the distribution of commodities at Jal el Bahr in the Tyre Area in October 1995, the Director of UNRWA Affairs, Lebanon, convened a BOI to investigate any irregularities and possible non-compliance with Agency Rules, Regulations and Norms.

II. On 11 November 1996, the BOI submitted to the Director of UNRWA Affairs what might be described as an Interim Report. It had by then met more than thirty times and interviewed twenty-five persons. The Report contained summaries of testimony from a number of witnesses relating to the Applicant. The identities of some of those witnesses were kept from the Applicant, either because it was felt that to divulge their names might endanger them or because it was clear that the identity of the accusers would have been known to the Applicant. The Interim Report also contained a record of the BOI's interview with the Applicant. The Tribunal is satisfied from that record that the Applicant understood the allegations against him and was afforded a reasonable opportunity of refuting the charges levelled against him.

III. The BOI observed that during its interview with the Applicant he was totally uncooperative, that he displayed selective amnesia (i.e. claiming failed memory in relation to matters where he could not provide a satisfactory answer) and that he obstructed the proceedings of the BOI. It concluded that the Applicant had misappropriated Agency funds, had intentionally violated the Regulations and Rules and had abused his authority as Social Worker and the authority delegated to him by his immediate superior. It stated:

> "... In [one] way or another he [has] always abused UNRWA's system and misappropriated its resources in order to make a personal wealth and/or prestige at the expense of the services/allotments and rights of the refugees. [The Applicant] has committed many wrongdoings, which unfortunately [were] covered [up] by his supervisor, ..."

It also set out the principal findings against him.

The Tribunal has carefully considered that Interim Report and the record of the interview with the Applicant and it is satisfied that there was ample evidence before the BOI to justify its conclusions.

IV. On 10 March 1997, the Deputy Director of UNRWA Affairs requested the BOI to reconvene to confront accused staff members, including the Applicant, with the accusations made against them and to submit a Supplementary Report. On this occasion, because the BOI was aware of a generally dangerous atmosphere in the Tyre area, it did not reveal the names of witnesses when it believed that to do so could jeopardise their safety. It used names only when such persons were already identified. The reconvened BOI met on 17 and 18 March 1997 and furnished its Supplementary Report to the Respondent on 15 April 1997.

V. In its Supplementary Report, the BOI included a summary of the allegations against the Applicant as well as a record of the interview with the Applicant. The Tribunal is satisfied that on this occasion, although some additional allegations were presented to him, he was furnished with sufficient information to understand their nature and was in a position to rebut them adequately. Documents were put to him, he was queried as to signatures on those documents and his evidence and explanations were recorded.

In the Supplementary Report, the BOI concluded that in so far as the Applicant was concerned no new facts were adduced to cause it to alter its earlier opinion. The Tribunal is satisfied that the BOI's conclusion was justified.

VI. On 7 May 1997, the Respondent wrote to the Applicant enclosing extracts from the BOI's reports, including its findings and conclusions. He noted that the BOI had arrived at its findings of the Applicant's misconduct having carefully assessed and weighed the testimony of witnesses, the testimony of the Applicant, and the relevant documentary evidence. He concluded, given the severity of the Applicant's misconduct, that he had to terminate the Applicant's services with the Agency, for misconduct, effective 12 May 1997 at close of business, under the provisions of Area staff regulation 10.2. Again, the Tribunal is satisfied that, based on the BOI reports, the Respondent was justified in terminating the Applicant's services.

VII. The Applicant lodged an appeal with the JAB against the termination claiming, among other things, that he had not been afforded his "due process rights" in the proceedings before the BOI for

the following reasons: He had not been afforded an adequate opportunity to defend against the charges of misconduct before the BOI because the nature of those charges was too unspecific and lacking in detail; he had not been provided sufficient information as to the nature of the evidence which had been given against him and the identity of a number of those witnesses had been withheld.

He further contended that his "due process rights" before the JAB were not adequately protected since he still lacked basic information, had not been furnished with the complete Reports of the BOI and the extracts furnished to him were inadequate to enable him to process properly his appeal to the JAB.

VIII. Whereas the Tribunal accepts that an amount of "detail" had been kept from the Applicant in the course of the BOI investigation because of the Administration's concern for the safety of witnesses and because of the unwillingness of such witnesses to have their identities revealed because they feared reprisals, the Tribunal is satisfied that this did not unreasonably deny the Applicant "due process".

IX. When substantial grounds exist for believing that the disclosure of witnesses' identities would endanger them, the Tribunal finds that it is reasonable to protect the anonymity of such witnesses, provided that in so doing, the person accused would still have sufficient information to address meaningfully the allegations made against him. Obviously there are cases in which it is essential for the accused person to know the source of the allegations against him in order to enable him to challenge the honesty, reputation or reliability of a witness. There are also cases in which a witness must be identified so as to afford "due process" to a person with an alibi or a similar defence In such cases the Tribunal is satisfied that the rights of an accused person to a fair hearing are superior to those of a person seeking anonymity. Under those circumstances the matter should proceed unless there is disclosure of the identity of the accuser or witness as the case may be.

X. The Tribunal is satisfied that no such circumstances, as outlined above, are apparent here. The accused was afforded a proper and reasonable opportunity to deal with the charges of misconduct in the course of the investigation by the BOI, notwithstanding that certain of the names of the

witnesses were withheld from him and notwithstanding that he was given limited "extracts" from testimony rather than the full unedited records.

XI. The JAB's report stated that it "examined all documents cited before it". It concluded that the Administration had acted within the framework of standing Regulations and Rules without the interference of prejudice or any other extraneous factors and recommended unanimously that the Administration's decision be upheld and that the case be dismissed.

It appears from the record that the Respondent "was unable to disclose the witness statements because of a danger to the security of the witnesses concerned. The principal witnesses at the time had been contacted for permission to release their statements and each witness requested that his or her statement be withheld for his/her own protection." The Tribunal has accordingly carefully considered the information which was considered by the JAB with a view towards examining whether the JAB had before it sufficient material to allow it to discharge its functions under the relevant Staff Regulations and Rules. The Tribunal sought further information in relation to this aspect of the case and further information has been provided. It has examined the entirety of the JAB file. The Tribunal notes the Respondent's position on the record as follows:

> "The Administration considers there is ample support for the findings of the Board of Inquiry in the witness statements collected during the extensive investigations. However, the Administration is unable to disclose these statements because of a real danger to the security of the witnesses concerned. The principal witnesses have been contacted for permission to release their statements to the Appellant for the purposes of the deliberations of the Joint Appeals Board, however, each witness requested his/her statement to be withheld for his/her own protection. The attention of the Joint Appeals Board is drawn to the opening paragraphs of the Board of Inquiry's supplemental report of 15 April 1997 (...) where it is stated that '[f]acing the generally dangerous atmosphere in the Tyre Area, the Board could not spell out names of witnesses as this could jeopardise the safety of some of them'. The danger to the personal security of the witnesses, which would result from releasing the witness statements has also been confirmed by the Field Administration Officer, Lebanon (...). Nevertheless, the Administration submits that the Board of Inquiry, having heard the oral evidence and having seen the witnesses giving such evidence, was best placed to make assessments of credibility and weight and the Joint Appeals Board should defer to its judgement and findings on the merits."

XII. The Tribunal must consider whether there was sufficient information before the JAB for it to have adequately reviewed the evidence which had been considered by the BOI and to make its independent assessment of that evidence in order to ascertain if it was adequate to support the findings of the BOI.

The Tribunal is satisfied that the proceedings of the BOI were fair and that the Applicant's rights to due process were respected, notwithstanding that the identity of many of the witnesses had been kept from him. However, the Tribunal is concerned that there was not sufficient material placed before the JAB to enable it to have discharged its duties and obligations in a proper and appropriate manner and is further concerned with the manner in which the JAB actually approached the hearing and consideration of the Applicant's appeal.

There is nothing contained in the report of the JAB that demonstrates that it had addressed the issues which arose in the proceedings before it. It may well be that there is merit in the Applicant's contention that the JAB had gone through the motions of a hearing but had paid only lip service to its duties and obligations in that regard.

The Tribunal agrees with the Applicant's contention in so far as there is nothing in the report of the JAB that suggests the JAB ever dealt with the real issues. The formulaic and arid language used in the JAB's report suggests that it failed to take cognizance of its obligations to review the matters giving rise to the appeal before it and to make its recommendations in a rational and a transparent way.

XIII. The Tribunal holds that the Applicant was not only entitled to a fair and proper hearing before the BOI, but also was entitled to similar consideration before the JAB. The Tribunal is wholly unconvinced that the Applicant was afforded due process or proper consideration in the proceedings before the JAB. Accordingly his rights to a proper hearing and an appropriate and proper review by the JAB were not vindicated.

XIV. The Tribunal considers that the JAB did not have sufficient information to carry out a proper and independent assessment of the proceedings and findings of the BOI. It had before it only "extracts", rather than the full testimonies. These by themselves did not contain sufficient information to support all of the BOI's findings adverse to the Applicant. The JAB which should

have considered the Applicant's complaints that he was not afforded due process clearly failed to consider them at all. In spite of its conclusion that the Agency "in deciding to terminate the Applicant's services had acted within the framework of standing Regulations and Rules without prejudice or other extraneous factor", the JAB clearly never dealt with the issues which were central to the Applicant's appeal.

XV. It is clear to the Tribunal that, whilst the BOI had considered the evidence and made value judgements where there was conflict as to who should be believed and who should not, no meaningful analysis of the BOI's work could have been or was carried out by the JAB as it did not have before it sufficient information.

The Tribunal is satisfied that the proceedings before the BOI afforded the Applicant with such information as was permissible in the light of the concerns expressed for the safety of witnesses and were sufficient to vindicate the Applicant's due process rights, limited as they were by the constraints or needs for protecting the witnesses' safety. The Tribunal is however not satisfied that such rights were adequately vindicated by the Respondent or by the JAB in the course of the JAB proceedings.

XVI. Since the Respondent's decision to terminate the Applicant's services for misconduct was based on the findings of the BOI rather than on the recommendations of the JAB, (which in any event recommended that the Respondent's said decision be upheld) the Tribunal is satisfied that this decision was made validly. Although the Tribunal finds that the Applicant was not afforded due process and fair procedures before the JAB, it considers that the shortcomings in the JAB's proceedings have been fully redressed by the Tribunal's reconsideration of the entire proceedings. Therefore, the Tribunal is satisfied that these shortcomings did not result in any loss or damage to the Applicant.

XVII. In view of the foregoing, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary

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DISSENTING OPINION BY MR. KEVIN HAUGH

I agree with the judgement of the Tribunal save that I consider the Applicant should be awarded compensation for the violation of his right to have had a meaningful review of his appeal by the JAB. This was rendered impossible by reason of the Administration's unwillingness to furnish to the JAB such information and documents as were necessary for a meaningful review of his case. I would consider appropriate compensation to be three months net base salary as of the date of his dismissal.

(Signatures)

Kevin HAUGH
Member

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary